STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 2002
v	No. 231903 Wayne Circuit Court
ANTHONY J. WILLIAMS, Defendant-Appellant.	LC No. 99-008744

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felony murder, MCL 750.316(1)(b). We affirm.

On appeal, defendant argues that his statement to police should have been suppressed because it was involuntary and the product of an illegal arrest and detention. We disagree. A trial court's ultimate decision on a motion to suppress is reviewed de novo. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). The court's underlying findings of fact supporting that decision are reviewed for clear error. *Id*. This Court will consider claims of constitutional error raised for the first time on appeal when the alleged error could have been decisive of the outcome. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In this case, the trial court conducted a *Walker*[1] hearing to determine if defendant's statement was voluntary. The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the statement was the product of the defendant's free and unconstrained choice. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). To determine voluntariness, the following factors, among others, should be considered:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him

[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338-339; 132 NW2d 87 (1965).

> before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

Here, defendant was arrested without a warrant late in the evening on August 11, 1999. He gave his statement at approximately 5:45 p.m. on August 12, 1999. A felony warrant was issued on August 14, 1999, and defendant was arraigned on August 15, 1999. Defendant alleged that he was questioned three times before making the statement, although his description indicated that each meeting was brief. He indicated that the first two meetings with police officers ended when he stated that he wished to remain silent. He further alleged that he sought an attorney, but was refused, and that he did not receive his *Miranda*[2] warnings until after he signed his statement during his third meeting with a police officer. These allegations were contradicted by testimony from the police officers involved, and the trial court concluded that the officers' testimony was more credible than defendant's testimony. We find no clear error in that conclusion. See *Beuschlein, supra*. Further, defendant was twenty-four years old at the time of trial and was educated through the twelfth grade, with a GED. He had been arrested once before in 1996. Defendant also acknowledged that he was not deprived of food or sleep before he gave his statement, he did not need medical attention, and he was not threatened with physical abuse.

Defendant also argues, for the first time on appeal, that he was entitled to suppression of his statement because of the prearraignment delay alone based on his interpretation of *Riverside v McLaughlin*, 500 US 44; 111 S Ct 1661; 114 L Ed 2d 49 (1991), an interpretation rejected by this Court in *People v Manning*, 243 Mich App 615, 626-627, 643; 624 NW2d 746 (2000). In *Manning*, we evaluated the effect of the *Riverside* decision on the *Cipriano* holding and concluded that a statement obtained in connection with a delay in a defendant's arraignment was inadmissible only if the statement was involuntary under the *Cipriano* factors. *Manning, supra* at 638, 643. Here, defendant's statement was given on August 12, 1999, less than twenty-four hours after he was taken into custody, and he was arraigned on August 15, 1999. Considering the totality of the circumstances, after evaluating the *Cipriano* factors, we cannot conclude that defendant's statement was the involuntary product of the prearraignment delay.

Defendant also claims for the first time on appeal that his statement should be suppressed as the fruit of the poisonous tree because his warrantless arrest was not supported by probable cause. Because this issue was not raised before the trial court, the record contains no evidence related to the information in the police officers' possession before defendant's arrest. Unpreserved issues are not considered on appeal if there is an insufficient record to allow for thorough review. *People v Allen*, 429 Mich 558, 612, 653; 420 NW2d 499 (1988), citing *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972). Finding an insufficient record, we decline to review this issue.

Defendant next argues that his defense counsel was ineffective for failing to argue that his statement should have been suppressed as the fruit of an unreasonable prearraignment delay

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

after a warrantless arrest that was unsupported by probable cause. We disagree. Because a *Ginther*[3] hearing was not conducted, this Court's review is limited to errors apparent on the record. See *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that his counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Further, a defendant must establish that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different and that the result of the proceedings was fundamentally unfair and unreliable. *Id*.; *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance is presumed and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Here, the record evidence does not support defendant's claim that his arrest was unsupported by probable cause or that his statement was involuntary, even considering the prearraignment delay. See *Manning*, *supra* at 635. Therefore, we have no basis to conclude that any additional motion by defendant's counsel to suppress the statement would have had merit. See *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), modified on other grounds 462 Mich 415 (2000). Defense counsel is not required to make useless motions. *Id*. Accordingly, we conclude that defendant failed to establish that any such error deprived him of a fair trial. See *Poole*, *supra*.

Defendant also argues that the trial court erred by rejecting his request to instruct the jury on felonious assault, MCL 750.82, as a cognate lesser included offense of felony murder. We disagree.

A cognate lesser included offense is a lesser offense that shares some common elements with, and is of the same class or category as, the greater offense, but which may also include elements not found in the greater offense. See *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999), quoting *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, i.e., malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316. *Carines*, *supra* at 758-759, quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery, but without intending to commit murder or inflict great bodily harm less than murder. See MCL 750.82; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). It is apparent from review of the elements that the offenses of felony murder and felonious assault do not share any overlapping elements; consequently, the offenses are not "cognate." See, e.g., *People v Harris*, 133 Mich App 646, 651; 350 NW2d 305 (1984); *People v Stubbs*, 110

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[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Mich App 287, 290; 312 NW2d 232 (1981). Accordingly, defendant did not have a right to interpose the alternative charge of felonious assault and the trial court's denial of defendant's request for such instruction was not an abuse of discretion. See *Perry*, *supra* at 63, n 19.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh